

THE STATE
versus
TICHAONA MUCHEDHE

HIGH COURT OF ZIMBABWE
MAKONESE J
GWERU 27 JANUARY 2016

Criminal Trial

T. Mpariwa for the state
Ms C. Mugabe for the accused

MAKONESE J: The accused who was aged 29 years at the time of the commission of the offence is facing one count of murder. It being alleged that on 19 June 2013 and at village Ganya, Chief Mkoka, Gokwe South the accused did wrongfully and unlawfully and intentionally kill Patrick Dube by striking him with a log on the right side of the head intending to cause his death.

The accused pleads not guilty to the charge of murder and tenders a limited plea of guilty with respect to culpable homicide. Accused's defence counsel confirmed that the limited plea was in accordance with her instructions. A plea of not guilty was entered in respect of the murder charge.

The facts surrounding the commission of the offence are summarized in the Statement of Agreed Facts (Exhibit 1). In brief, the deceased Patrick Dube who was aged 34 years at the time he met his death resided in the same village with accused. On 19 June 2013, the deceased and accused's brother Innocent Muchedhe were quarrelling. The quarrel was apparently over the fact that deceased had let his cattle stray into a cotton field belonging to Muchedhe. Accused arrived at the scene and found the deceased and his brother facing each other. Innocent Muchedhe was armed with an axe and an iron rod whilst deceased was armed with a hoe handle and a whip. One Manyongodo who had also arrived at the scene got in between the warring parties in a bid to restrain them. Accused suddenly, without explanation struck the deceased on the forehead with a log. Deceased fell to the ground bleeding from the nose and mouth. Accused attempted to

render first aid on the injured deceased but he died moments later as a result of injuries sustained in the assault. The matter was reported to the police leading to the arrest of the accused.

The state tendered a Post Mortem Report compiled by Dr Gonouya at Gokwe South District Hospital on 20 June 2013. The cause of death is listed as “head injury.” The Post Mortem Report is marked Exhibit 2 and is rather scant on detail. Medical Practitioners are reminded to compile comprehensive Post Mortem Reports reflecting the nature of injuries observed and the degree of force used to inflict those injuries. Detailed Post Mortem Reports assist the court in determining the exact extent, and nature of injuries suffered by the victims. This assists in formulating the degree of moral blameworthiness in each and every case.

The defence objected to the production of the log brought to court as an exhibit arguing that the actual log was never recovered from the scene of the crime. It is observed, here that the police must always ensure that the correct exhibits are brought to court and properly measured, tagged and weighed. Exhibits in the form of murder weapons are a critical part of the evidence the court must use in determining the guilt of an accused and in particular assess the degree of negligence, particularly in cases of culpable homicide and murder. In this case the court is left to speculate as to what type of weapon was used.

However, from the evidence presented before the court, the court is satisfied that there is no evidence to support a conviction of murder as it has not been established that the accused possessed the requisite *dolus directus* or *dolus eventualis* to kill the deceased. The court, accordingly acquits the accused on the charge of murder but finds him guilty of culpable homicide.

Sentence

The accused stands convicted of a serious offence. He struck the deceased on the head with a log causing a depressed skull fracture on the head. The Post Mortem Report indicates that the cause of death was a head injury. The court shall take into proper consideration all the mitigating features of the case and the personal circumstances of the case as outlined by accused’s defence counsel. The accused is a first offender. This incident is accused’s first brush with the law. He is married with two wives and eight children. He has heavy family responsibilities. As is usually the case, it is the dependents of the offender who suffer the most

as a result of the conviction and sentence. The accused has shown a certain degree of remorse and contrition. He paid four beasts as compensation to the deceased's family and assisted in the funeral. The courts do not condone the payment of forced compensation to avenge spirits, but accepts that the accused has a moral duty to assist with the funeral expenses borne by the victims' family. I find that the moral blameworthiness of the accused is on the high side for the following reasons:

- 1) he was not involved in the dispute between deceased and his brother.
- 2) the wronged party was accused's brother who seemed to exercise restraint at the critical time.
- 3) There was no plausible reason for the sudden attack on the deceased.
- 4) The weapon used was a log which is a dangerous weapon
- 5) The accused aimed the blow on a sensitive part of the body which is the head.
- 6) The degree of force used must have been excessive as evidenced by the nature of injuries.

I find that the sentence imposed in this matter must reflect the view of the courts, that violence is not tolerated as a means of resolving disputes. The accused acted recklessly in the circumstances with fatal consequences. I do not accept that it was reasonable for the accused to fight his brother's wars. As has been stated by the state counsel the accused acted like the one who was crying more than the bereaved. It is a fact in favour of accused that he spent more than two years before trial. An appropriate sentence is as follows:

10 years imprisonment of which 3 years imprisonment is suspended for 5 years on condition accused does not within that period commit an offence of which violence is an element for which he is sentenced to imprisonment without the option of a fine.

Effective 7 years imprisonment.

*National Prosecuting Authority, state's legal practitioners
Lunga Gonese and Attorneys' accused's legal practitioners*